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No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CITY OF NORFOLK, VIRGINIA, *et al.*,
Petitioners,

v.

HERBERT M. COLLINS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

H. BARTOW FARR, III
RICHARD G. TARANTO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

R. HARVEY CHAPPELL, JR.*
PAUL W. JACOBS, II
CHRISTIAN, BARTON, EPPS,
BRENT & CHAPPELL
1200 Mutual Building
909 East Main Street
Richmond, Virginia 23219
(804) 644-7851

PHILIP R. TRAPANI
HAROLD P. JUREN
OFFICE OF THE CITY ATTORNEY
908 City Hall Building
Norfolk, Virginia 23501
(804) 441-2871

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

This case presents several related questions about the meaning of Section 2 of the Voting Rights Act, as interpreted in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and its application to at-large electoral systems:

1. In considering the issue of "legally significant racially polarized voting" (*Gingles*) to determine whether black voters have an equal opportunity to elect "representatives of their choice" within the meaning of Section 2, may a court of appeals require, as a matter of law, proof of usual success in achieving proportional representation, even though Section 2 expressly states that it does not grant a right to proportional representation?

2. In determining whether black voters are being denied an equal opportunity to elect "representatives of their choice," may a court of appeals conclude, as a matter of law (and by adopting a legal presumption), that an elected candidate who receives a majority of black votes and the endorsement of the leading black political organization in a multi-seat election is not a representative of black voters' choice merely because another candidate with more black votes loses?

3. Under what conditions may a court of appeals determine, as a matter of law, that an elected representative of choice of black voters must not be counted among black electoral successes because of the "special circumstances" (*Gingles*) that the representative was elected after suit was brought or was elected as an incumbent?

4. Did the court of appeals in this case disregard this Court's ruling in *Gingles* that a district court's "totality of the circumstances" determination regarding the presence or absence of vote dilution may be reversed only if it is clearly erroneous?

LIST OF PARTIES

The petitioners, who were defendants in the action below, are the City of Norfolk, Virginia, a municipal corporation; Vincent J. Thomas, Mayor, Dr. Mason C. Andrews, Joseph A. Leafe, Rev. Joseph N. Green, Jr., Claude J. Staylor, Jr., Robert E. Summers, and Mrs. Elizabeth M. Howell, in their official capacity as members of the Norfolk City Council at the time of suit; the City of Norfolk Electoral Board; and Paul D. Fraim, Martha H. Boone, and Paul M. Lipkin, in their official capacity as members of the City of Norfolk Electoral Board at the time of suit. The respondents, who were plaintiffs in the action below, are Herbert M. Collins, Dr. H. Marks S. Richard, Barbara C. Parham, William E. Swindell, Jr., Dr. Milton A. Reid, Julian Hazel, George Banks, and the Norfolk Branch, National Association for the Advancement of Colored People.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The City of Norfolk, Virginia, together with the members of the Norfolk City Council and the City of Norfolk Electoral Board and its members, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (*Collins VI*, Pet. App. 1a-37a) are reported at 883 F.2d 1232. The opinion of the district court (*Collins V*, Pet. App. 38a-98a) reversed by the court of appeals is reported at 679 F.Supp. 557. The initial decision of the district court (*Collins I*, Pet. App. 132a-193a) is reported at 605 F.Supp. 377. The opinions of the court of appeals affirming that decision (*Collins II*, Pet. App. 114a-131a) and following this Court's remand (*Collins IV*, Pet. App. 99a-112a) are reported, respectively, at 768 F.2d 572 and 816 F.2d 932.

JURISDICTION

The court of appeals entered judgment on August 18, 1989. Pet. App. 194a-195a. On October 3, 1989, a petition for panel rehearing was denied by a vote of 2 to 1, and the court of appeals determined, by a vote of 5 to 5, not to rehear the matter en banc. Pet. App. 196a-197a (corrected order superseding initial rehearing denial dated Sept. 27, 1989). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

The pertinent parts of Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973, and of Rule 52(a), Fed. R. Civ. P., are reprinted at Pet. App. 198a-200a.

STATEMENT OF THE CASE

Respondents brought suit alleging that the at-large system for electing the members of the Norfolk City Council violates the Constitution and Section 2 of the Voting Rights Act of 1965, as amended in 1982, 42 U.S.C. § 1973. The district court rejected the constitutional as well as statutory challenges. With respect to the latter, the court held that Norfolk's black voters had no "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" (42 U.S.C. § 1973) to the Norfolk City Council. It based that holding on extensive factual findings that respondents had failed to establish any of the identified factors suggesting a Section 2 violation (*see Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986); S. Rep. 417, 97th Cong., 2d Sess. 28-29 (1982); Pet. App. 5a-6a n.3) and that in Norfolk, judging from a history of 10 elections over two decades, "black-preferred candidates usually win, and . . . white bloc voting does not usually defeat the black voters' preferred candidates." Pet. App. 57a. A divided court of appeals reversed, finding liability under Section 2. The court of appeals found a violation as a matter of law based solely on its view of black voters' lack of sufficient electoral success—

particularly, on its view that black voters had not usually been able to achieve proportional representation, a conclusion reached by discounting the election of both black and white candidates who received majority black support and black political sponsorship.

1. *Background.* The district court's findings describe the electoral success that black voters in Norfolk—who made up 24.07% of the voting age population in 1970 and 31.48% in 1980, and whose registration and voting rates are higher than those of Norfolk's white population (Pet. App. 146a-147a)—have had in electing "representatives of their choice" to the seven-member City Council.[1] From 1968 to 1986, the candidates who received a majority of black voter support have usually been elected: 11 of 19 (58%) such candidates won. *Id.* at 66a-67a. During the same period, black voters' first choice candidate was elected in 7 out of 10 elections (70%), and either the first or second choice was elected in every such election. *Id.* at 208a-217a.[2] At the same time, more than half (8 of 14, or 54%) of all *black* candidates who received a majority of black support have been elected. *Ibid.*[3] This string of electoral successes, as

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[1] The City Council has seven members, each of whom serves for four years. The terms are staggered, and elections are held every two years. Voters may vote for as many candidates as there are seats open, though they may cast votes for fewer than that number. The candidates with the most votes win; there is no absolute-majority requirement, and there are no run-off elections. Pet. App. 3a-4a, 42a.

[2] The district court's findings were based on the 10 elections from 1968 to 1986, in every one of which black candidates vied for seats on the City Council. Pet. App. 59a. In 1988, following entry of the district court's judgment, black candidate John Foster was reelected with a majority of the votes in 53 of 54 precincts, stretching the success rate to 8 of 11 elections (72.7%) in 20 years. The court of appeals took judicial notice of the 1988 results. *Id.* at 20a, 201a, 202a.

[3] The success rate for *all* black candidates, whether or not they were supported by a majority of black voters, was 30.4%, slightly better than the white success rate of 29.2%. Pet. App. 59a.

shown on the following table, was achieved in crowded multi-candidate fields, which included at least twice as many white candidates as available seats and one or more black candidates running in each election. *See* Pet. App. 56a, 202a-217a (showing 1968-1988 election results).

TABLE OF NORFOLK CITY COUNCIL ELECTION RESULTS FOR ALL CANDIDATES WHO RECEIVED MORE THAN 50 PERCENT OF THE VOTES OF BLACK VOTERS, 1968-1986

Year	Name	Result	% Black Vote	Rank
1968	Jordan	*Elected*	91.9%	1st
1970	Walton	Defeated	92.4%	
1972	Jordan	*Elected*	98.3%	1st
1974	Bond	Defeated	73.4%	
	Howell (W)	*Elected*	58.2%	2nd
	Staylor (W)	*Elected*	56.5%	3rd
1976	Jordan	*Elected*	97.3%	1st
	Hill (W)	Defeated	76.3%	
	Hurst (W)	Defeated	75.6%	
1978	Green	*Elected*	96.1%	1st
	Howell (W)	*Elected*	68.5%	2nd
1980	Butts	Defeated	92.9%	
	Howell (W)	*Elected*	72.9%	2nd
1982	Green	*Elected*	88.2%	1st
	Butts	Defeated	87.6%	
1984	Foster	*Elected*	79.9%	1st
	Butts	Defeated	72.1%	
1986	Green	*Elected*	90.3%	1st
	Harris	Defeated	84.1%	

(W)—Indicates white candidates; all others are black.

Summary: 11 of 19 (58%) black-preferred candidates have won through 1986 (12 of 20 including 1988); 7 of 13 (54%) *black* black-preferred candidates have won through 1986 (8 of 14 including 1988); the first choice among black-preferred candidates has won in 7 out of 10 elections (8 of 11 including 1988).

Source: Pet. App. 208a-217a (Def. Ex. 470). (For 1988, see Pet. App. 202a-207a.) The "% Black Vote" uses Norfolk's statistics, as did the court of appeals. Pet. App. 9a.

A similar picture of electoral success is revealed by examining the results of endorsement by major black political organizations in Norfolk City Council elections. From 1972 to 1986, the candidates supported by the Concerned Citizens of Norfolk ("Concerned Citizens")—which was found by the district court and recognized by the court of appeals to be the paramount black endorsement group since 1972 (Pet. App. 72a-73a, 119a)—have won 60% of the time (15 of 25 candidacies). In the three elections from 1984 through 1988, another major black endorsement group, the Rainbow Coalition, succeeded in electing eight of its nine endorsed candidates, including three of four black candidates. *Id.* at 74a, 202a-207a.

The result of those voting patterns is that, for more than two decades, candidates supported by a majority of black voters have served on the City Council. From 1968 to 1974, there was one City Council member (Jordan), or 14%, who had been elected with a majority of black support. From 1974 to 1978, the City Council had three members (Jordan/Green,[4] Howell, and Staylor), or 43%, elected with a majority of black support. From 1978 to the present, the City Council has had two such members (Green and Howell from 1978 to 1984, and Green and Foster thereafter), or 29%. In short, since 1974 there have been at all times at least two City Council members (29%) and, for four of those years, three members (43%) supported by a majority of black voters in their most recent election.[5]

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[4] Jordan resigned in 1977 to become a judge and was replaced by Rev. Green.

[5] As for the race of the members, the City Council had one black member from 1968 to 1984 (Jordan, then Green) and has had two black members since 1984 (Green and Foster). Those members were among the representatives supported by a majority of black voters. Like them, the other such representatives (Howell, Staylor, both white) not only were elected with majority black support but were

2. *This Lawsuit.* Respondents filed this action in 1983, seeking to replace Norfolk's at-large election system with a ward system—the wards, or single-member districts, to be drawn so that a number of them (based on the black proportion of the population) would have a majority of black voters. Respondents challenged the at-large system under the 1982 version of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, as well as under the Fourteenth and Fifteenth Amendments, on the ground that the system unlawfully dilutes black voting strength. In support of their Section 2 vote-dilution claim, respondents alleged the applicability of every single factor that was identified as relevant by the key 1982 Senate Committee Report, S. Rep. 417, 97th Cong., 2d Sess. 28-29 (1982), and subsequently relied on by this Court in *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986).

After a 10-day bench trial, the district court rejected respondents' claims, finding in a lengthy opinion that the evidence did not support any of those claims. Pet. App. 133a-193a (*Collins I*). The court of appeals affirmed in a 2-1 decision. *Id.* at 114a-131a (*Collins II*). This Court subsequently vacated the judgment and remanded for reconsideration in light of the intervening decision in *Thornburg v. Gingles, supra.* Pet. App. 113a (*Collins III*); *see* 478 U.S. 1016 (1986). The court of appeals, in turn, remanded the case to the district court for reconsideration in light of *Gingles.* Pet. App. 99a-112a (*Collins IV*).[6]

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endorsed by Concerned Citizens and defeated black candidates among black voters.

Judge Jordan served as Vice Mayor from 1972 to 1977, and Rev. Green has served in that post since 1982. *See* Pet. App. 163a.

[6] By the time of that remand, the majority of the Senate Report factors previously challenged—as to which the district court found against respondents—were no longer in issue. Accordingly, since that stage of the litigation, it has not been disputed that (1) there is no history of official discrimination in the State or in Norfolk

The remand by the court of appeals in substance focused on whether black voters have been denied the ability to elect the "representatives of their choice" because a sufficiently cohesive white voting bloc is "*usually* . . . able to defeat candidates supported by a politically cohesive, geographically insular minority group," *Gingles*, 478 U.S. at 49 (setting forth necessary preconditions of a Section 2 vote-dilution claim). Pet. App. 99a-113a.[7] The court of appeals required the district court, in evaluating black voters' electoral successes, to apply a legal presumption that a candidate who has received a majority of black voters' support is *not* a representative of their choice if another candidate has received more black votes but lost. *Id.* at 108a. That presumption, which was rebuttable, was to apply even in elections, as in Norfolk, where several seats are open and, therefore, where there could be (as there was here) more than one candidate of choice.

3. *The District Court's Second Opinion.* On remand, the district court, in another lengthy opinion that considered the "totality of the circumstances," found that re-

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that now touches the right of Norfolk's black citizens to register, to vote, or otherwise to participate in the democratic process; (2) Norfolk does not have unusually large election districts, majority vote requirements, anti-single shot provisions or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (3) Norfolk's black citizens do not bear the effects of discrimination in such areas as education, employment, and health in any way that currently hinders their ability to participate effectively in the political process; (4) political campaigns in Norfolk have not been characterized by overt or subtle racial appeals; and (5) the existence of the at-large system in Norfolk, which dates back to 1918, is not the result of a tenuous state or local policy. Pet. App. 42a.

[7] Specifically, the district court was instructed to inquire into "Racially Polarized Voting" (or "legally significant racially polarized voting," *Gingles*, 478 U.S. at 56) and "Minority Electoral Success." Pet. App. 104a, 106a. The district court also was directed to consider whether there was any discrimination in the construction of candidate slates and whether certain acts showed a lack of responsiveness to minority concerns. *Id.* at 110a-111a.

spondents had failed to prove "structural [vote] dilution" (*Gingles*, 478 U.S. at 51). The principal reason was that the white population of Norfolk had not in fact voted "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate" (*ibid.*). Pet. App. 39a-98a (*Collins V*).

In rejecting respondents' claim that there had been too few black electoral victories,[8] the district court followed the three-step analysis set forth by this Court in *Gingles*, 478 U.S. at 50-51. The court found the presence of the first two preconditions of a vote dilution claim seeking a ward system: (1) that Norfolk's black voters are geographically situated so that a ward system would create two "safe" seats (leaving few black voters in the more numerous remaining wards);[9] and (2) Norfolk's black voters are politically cohesive, in that they commonly vote in large numbers for the same candidates. Pet. App. 51a-52a. The court found, however, that the third necessary precondition of the vote dilution claim was missing: "Norfolk's whites do not vote sufficiently as a bloc that they usually defeat the minority's preferred candidate." *Id.* at 52a. To the contrary, the court found that in Norfolk, unlike the districts in *Gingles*, not only is there no "usual predictability" (478 U.S. at 51) of defeat for black-preferred candidates, but the usual course is success: "the white cross-over vote has combined with the black vote to elect the black-preferred candidates *most of the time*." Pet. App. 55a (emphasis added). In support of that finding, the court noted the consistent level of

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[8] The district court reaffirmed its earlier findings, which had not been disturbed on appeal, under which the absence of virtually all of the Senate Report factors was now settled. Pet. App. 42a; *see also id.* at 47a-49a (contrasting facts here with facts in *Gingles*). It also found no legally significant racially polarized voting, no lack of responsiveness, and no discriminatory slating process. *Id.* at 49a-57a, 85a-97a.

[9] In this regard, the district court found: "It is doubtful that establishing a ward system would produce a greater black presence on Norfolk's City Council than is already there." Pet. App. 52a.

substantial white crossover voting for candidates supported by a majority of black voters (Pet. App. 55a-56a)[10] and found—as set forth in more detail above (pp. 3-5, *supra*)—that, from 1968 through 1986, black-preferred candidates with the help of a consistent level of white crossover votes have *usually won*. Pet. App. 66a-67a.[11]

The district court rejected each of respondents' several arguments for not counting certain elected black-preferred candidates (the effect of which would be to reduce the level of significant black electoral success). With respect to Mrs. Howell in 1974 and 1980 and Mr. Staylor in 1974—both of whom were elected with majority black support and the endorsement of the major black political organization—the district court found that both were in fact representatives of black voters' choice. Pet. App. 70a-71a.[12] With respect to the 1984 election of Rev.

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[10] White crossover voting averaged 25% for black-preferred candidates from 1968 to 1986. Pet. App. 56a. That level of support is greater than the white support received by more than half of the white candidates. *Ibid.* In fact, white voter support for black-preferred candidates has frequently been higher than 25%—*e.g.*, 38% for Mrs. Howell and 66% for Mr. Staylor in 1974; 32% for Rev. Green in 1978; 31% for Mrs. Howell in 1980; 31% for Rev. Green in 1982. *See* Pet. App. 209a-211a, 213a.

[11] The court noted that, although the 66% white population could win every seat if it voted as a bloc, white-preferred candidates between 1968 and 1986 won only 25 of 38 seats, or 66%. Similarly, black-preferred candidates during the same period won 11 of 38 seats, or 29%. Both figures are, of course, roughly equivalent to population proportions. Pet. App. 66a-67a.

[12] This finding rebutted the presumption announced in the court of appeals' remand order that they did not have that status because in each of these elections another candidate received more black votes but lost. The district court found the court of appeals' presumption rebutted by the clear evidence of black support, both numerical and testimonial. Pet. App. 70a-71a. For example, Mrs. Howell won 58% of the black votes in 1974 and 73% in 1980. (In 1978, she received 68% black support and was the second choice of black voters, who elected their first choice as well.) She defeated black candidates among black voters in both 1974 and 1980 (in-

Foster, the district court found that it counted as a black electoral success, finding for a second time that there was no evidence that Rev. Foster's election was somehow orchestrated by white leaders to moot this lawsuit (*see* Pet. App. 77a; *see also id.* at 163a-164a (first district court opinion), 117a & n.3 (Fourth Circuit upholding that finding)) and that there was "no evidence of unusual white voting patterns in the 1984 election." *Id.* at 77a.[13]

Having concluded that there was no legally significant racially polarized voting, the district court also considered—in accordance with this Court's decision in *Gingles*, 478 U.S. at 77—whether black representation has been so nearly proportional as to preclude relief even if legally significant racially polarized voting had been found. The court found that black representation has been essentially proportional—either two (29%) or three (43%) seats on the City Council since 1974. That representation was as close to proportional as in *Gingles*' District 23, as to which this Court reversed a finding of liability. Pet. App. 83a-85a.

4. *The Court of Appeals' Decision.* a. A divided panel of the court of appeals reversed, holding that the at-large

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cluding respondent Banks) and received Concerned Citizens' endorsement in both years. Mr. Staylor, in 1974, received 56% of the black vote, ahead of three black candidates (including respondent Reid). As to confirming testimony, see Pet. App. 70a-71a (Virginia House of Delegates member Robinson); Tr. 55 (respondent Banks); Collins Dep. 15 (respondent Collins); Parham Dep. 56, 84-85 (respondent Parham).

[13] Respondents argued that *every* successful black candidate in the last 20 years has won due to "special circumstances." Pet. App. 74a-75a (emphasis added). The court rejected all of those claims. *Id.* at 74a-82a. With respect to respondents' claim that the reelection of incumbents should not count, the court found that the fact "[t]hat some of the winners were incumbents does not negate the overall pattern of black success." *Id.* at 80a. Indeed, the court pointed out that "the re-election rate of black incumbents is 100 percent, which is greater than that of whites." *Ibid.*

election system used for 71 years in one of Virginia's most populous cities must be abolished and ward lines drawn. Pet. App. 1a-22a (*Collins VI*). The court concluded, contrary to the district court's findings, that respondents had established that whites in Norfolk "vote sufficiently as a bloc usually to defeat the minority's preferred candidates" (*Gingles*, 478 U.S. at 56). Pet. App. 8a, 9a. The court of appeals reached that conclusion based on its view of who counts as "representatives of [black voters'] choice" (Section 2) and of what black electoral successes should be disregarded in the analysis.

First, the court rejected the district court's findings that Mrs. Howell in 1974 and 1980 and Mr. Staylor in 1974 were representatives of choice for black voters. Pet. App. 9a-15a. Following its presumption that they were not "representatives of [black voters'] choice" because they were not the "most preferred" candidates of black voters (*i.e.*, in each case another candidate received more black votes but lost), the court of appeals held that the presumption had not been rebutted. *Id.* at 10a-11a. The court discounted Concerned Citizens' endorsement and declared "immaterial" the fact that both Mrs. Howell and Mr. Staylor defeated other black candidates. *Id.* at 11a. Instead, what the court considered "critical" was "the difference between the black support for the candidate who received the most black votes yet lost and for the candidates who won with fewer black votes." *Ibid.* The court also considered significant selected testimony concerning Mrs. Howell's and Mr. Staylor's substantive views in 1984. *Id.* at 12a-13a. For those reasons, the court concluded, Mrs. Howell's victories in 1974 and 1980 and Mr. Staylor's victory in 1974 could not properly be counted as occasions when black voters elected "representatives of their choice."

The court further discounted black voters' electoral successes—dismissing as insignificant the statistics showing overall black candidate success in 7 of the 10 elections between 1968 and 1986—by reformulating the test to be

applied in judging relevant electoral successes. Pet. App. 15a-16a. The court ruled that the proper subject of inquiry was not black voters' overall ability to elect their preferred candidates, but their ability to fill a second seat on the City Council, *i.e.*, the proportional seat. *Id.* at 15a. *See also id.* at 2a ("The principal issue is whether [respondents] have less opportunity than other members of the electorate to elect *more than one councilman* as the 'representatives of their choice.'") (emphasis added). Even more narrowly, the court suggested that the proper focus was the ability to fill that proportional seat with a *black* candidate (*id.* at 15a), although it had previously noted the conclusion of a plurality in *Gingles* that the candidates' race was irrelevant (Pet. App. 8a n.7). The court noted that a second black member was not elected until 1984. Moreover, the court of appeals concluded that "regardless of the race of the candidate[,] the black community, prior to the institution of this suit, could not elect a second representative of their choice" (*id.* at 16a), a conclusion that the court presumably thought followed from its earlier decision to disregard the election of Mrs. Howell in 1974 and 1980 and of Mr. Staylor in 1974.[14]

The court took two additional steps to shrink the ranks of black voters' electoral successes. First, it decided to disregard, as aberrational due to "special circumstances," the 1984 election of Rev. Foster, a black candidate who won with 80% black voter support and the endorsement of Concerned Citizens. Pet. App. 17a-20a. To do so, the court had to reverse as clearly erroneous the district court's finding that there was no unusual white voting pattern for Rev. Foster.[15] Second, the court of appeals

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[14] The court of appeals simply ignored the fact that, in 1978, black voters did elect their two most-preferred candidates to the City Council—Rev. Green and Mrs. Howell. *See* Pet. App. 211a.

[15] The principal basis for the court of appeals' ruling was its view of which other elections were properly compared to the 1984 election. Following its earlier exclusive focus on the ability to fill the proportional seat, the court of appeals rejected the district

ruled that incumbency was a "special circumstance" that diminished the significance of various black electoral victories. Pet. App. 20a-21a. In addition to suggesting that Rev. Green's appointment to office in 1977 had "little bearing on the black community's ability to elect a second representative" except when he ran as an incumbent after 1984, the court concluded more generally that "incumbency was a significant factor in black electoral success." *Id.* at 20a.[16] The incumbents' victories in 1986 and 1988, the court concluded, "coupled with the pendency of this action and the manifest desire to moot it as evidenced by the 1984 election," was not enough to "negate the existence of the white bloc voting" that it had already found by winnowing down the field of electoral successes in the previous parts of its opinion. *Id.* at 21a.[17] Based on those findings, the court of appeals directed the district court to enjoin at-large elections and to require creation of a new election system. *Id.* at 22a.

b. Judge Chapman dissented from the panel's judgment and from each of its rulings. Pet. App. 22a-37a. First, he explained that, contrary to the panel's view, a "representative of choice" under Section 2 cannot be limited, in multi-seat elections, just to the candidate who

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court's examination of all elections involving black candidates and instead compared the 1984 election only to those elections in which a second black candidate received majority black support but lost. Pet. App. 18a. Again focusing on the race of the candidate (and therefore ignoring Mrs. Howell's 1978 victory, *see* note 14, *supra*), the court asserted that Rev. Foster's 26.6% white vote was greater than that received by any previous black candidate for a second seat. Pet. App. 19a. The court also relied on the Mayor's endorsement of Rev. Foster in disregarding the 1984 election.

[16] Without further explaining why incumbents' reelection diminished black voters' ability to elect representatives of their choice, the court observed that whereas "[n]o black incumbent was ever defeated," from 1968 to 1986 "with two exceptions . . . no black candidate who was not an incumbent was elected." Pet. App. 20a.

[17] The court of appeals left undisturbed the district court's finding that there was no discriminatory slating process and no lack of responsiveness. Pet. App. 21a.

receives the most minority votes. He further reasoned that the panel's reliance on Mrs. Howell's and Mr. Staylor's substantive views was improper because it establishes "a litmus test for the political beliefs of minority preferred candidates." *Id.* at 23a-29a. Judge Chapman also disagreed with the panel's adoption of the view that "the correct legal test for bloc voting is whether the majority votes sufficiently as a bloc to usually defeat candidates *for a proportional seat.*" *Id.* at 30a. He explained that this "new and sweeping rule" (*ibid.*) effectively "establishes a right of proportionality" (*id.* at 32a) under which "[a]ny at-large system, which does not usually produce proportional representation, is now illegal" (*id.* at 33a)—a rule plainly contrary to Section 2's express denial of any right to proportional representation. *Id.* at 31a-34a.[18]

c. A petition for panel rehearing was subsequently denied by a 2-1 vote, and a suggestion for rehearing en banc was denied by a vote of 5 to 5. The court of appeals granted a stay pending the timely filing of a petition for a writ of certiorari. Pet. App. 196a-197a.

REASONS FOR GRANTING THE WRIT

This case presents important questions about the proper application of Section 2 of the Voting Rights Act. Since 1974, in Norfolk, it has been more the rule than the exception that candidates supported by a majority of black

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[18] With respect to the panel's rejection of Rev. Foster's 1984 victory, Judge Chapman pointed out that the panel's ruling rested on the erroneous exclusive focus on black voters' ability to fill a second seat. Judge Chapman added that the panel's ruling on the 1984 election in any event fell of its own weight, because another black candidate not supported by the Mayor received white support comparable to that received by Rev. Foster. Hence, the levels of white support for Rev. Foster were not attributable to the actions of Norfolk's white political leaders. *Id.* at 34a-36a. Judge Chapman also disagreed with the panel's view that incumbency somehow diminished the significance of black electoral successes, explaining that, given the universal importance of incumbency in American political life, the panel's view "would make practically every American election a 'special circumstance.'" *Id.* at 36a-37a.

voters have been elected to the City Council. During that time, "the white cross-over vote has combined with the black vote to elect the black-preferred candidates *most of the time.*" Pet. App. 55a (emphasis added). As a result, in a city with a black voting age population of between 24 and 32 percent, at least two (and sometimes three) members of the seven-member council have been elected with majority black support in their last election. Finding those facts, and applying the principles of *Thornburg v. Gingles*, the district court found that the at-large system of elections in Norfolk did not dilute black voting power.

The Fourth Circuit, in finding a Section 2 violation, took a radically different view. To begin with, although the Voting Rights Act explicitly disclaims any intent to confer a right to proportional representation,[19] the court of appeals held that the necessary inquiry under Section 2 is not the overall ability of blacks to elect "representatives of their choice" over time, but their ability to elect representatives (in this case, two) in proportion to their percentage of the voting population. Moreover, contrary to the views of the Fifth Circuit, the court applied a novel, and extremely narrow, definition of the statutory term "representatives of their choice," concluding that candidates with majority black support are presumed *not* to be "representatives of [black voters'] choice" whenever an unsuccessful candidate gets more black votes. *Compare* Pet. App. 108a *with Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987), *cert. denied*, 109 S. Ct. 3213 (1989) (in a multiple seat election, the minority will necessarily have more than one preferred candidate). The practical effect of those rulings, taken together, is to condemn any at-large voting

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[19] "*Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b).

system that does not invariably, or almost invariably, produce the same results as voting by separate districts.[20]

The approach taken by the Fourth Circuit is a serious departure from the principles set out in Section 2 and in the opinion of this Court in *Thornburg v. Gingles*. It is simply incorrect to say that the focus of inquiry under Section 2 should be on voters' ability to elect the number of representatives corresponding to their percentage of the voting age population. It is likewise incorrect to hold that candidates with majority support from particular voters are nonetheless presumed not to be "representatives of their choice." Were this the law, it would be virtually impossible for any jurisdiction to maintain an at-large voting system, thus invalidating by far the most common system used in municipalities throughout the United States.[21] The questions raised by the decision below are thus of widespread significance, and review by this Court is warranted.[22]

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[20] As discussed below (pp. 22, 26-29, *infra*), the court also committed errors in its conclusions that the 1984 election and the reelection of incumbents were "special circumstances," in its treatment of the district court's factual findings, and its reliance on the race of candidates in measuring relevant black electoral successes. The last of those errors conflicts with decisions of the Tenth and Eleventh Circuits, *Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989), *cert. pet'n filed*, No. 89-353 (Aug. 28, 1989); *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1557-58 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1111 (1988).

[21] According to a 1986 survey of several thousand cities, more than 88% of cities employ either pure at-large systems (64.0%) or mixed systems (24.3%). M. Schellinger, *Today's Local Policy Makers: A Council Profile Baseline Data Report, Vol. 20, No. 4*, at Table 3 (Int'l City Mgt. Ass'n, July/August 1988). *See also* Int'l City Mgt. Ass'n, *The Municipal Year Book, 1989* at 63 (54.5% of counties in survey employ at-large or mixed systems for election of county commissions).

[22] In none of the other Section 2 cases that have come before this Court since *Gingles* has the district court found in the jurisdiction's favor with respect to every one of the Senate Report factors and been reversed by the court of appeals. Moreover, in none of

I. The Court Of Appeals Erroneously Held That Ability To Fill The Proportional Seat (With A Black Candidate) Was The Necessary Measure Of Black Electoral Success.

The court of appeals set out on the wrong foot in this case by saying that "[t]he principal issue" turned on the ability of black voters to fill a second (*i.e.*, proportional) seat on the Council. Pet. App. 2a. Rather than look at overall election results in Norfolk, the court said that it was concerned specifically with whether black voters were able to fill that second seat with a black candidate. *Id.* at 15a.[23] With or without the limitation to black candidates, that standard for measuring black electoral successes is incompatible with Section 2.

The decision to insist on success in filling two of seven Council seats is nothing more than a decision to require usual proportional representation. *See* Pet. App. 33a (Chapman, J., dissenting) (majority opinion "does not merely creep up to the notion of proportionality, it embraces it"). But Congress, in the statute itself, emphatically rejected the notion of proportional representation.

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the four petitions since *Gingles* that have sought review of rulings against at-large systems under Section 2 had *any* minority group member been elected to the political body challenged. *See Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 109 S. Ct. 3213 (1989); *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 3213 (1989); *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1534 (1989); *Carrollton Branch of NAACP v. Stallings*, *supra*. In *Sanchez v. Bond*, *supra* (cert. pet'n pending, No. 89-353), the Tenth Circuit affirmed a district court determination that there was no legally significant racially polarized voting and no Section 2 violation based in part on the successful elections of minority-supported white candidates.

[23] In so doing, the court of appeals deemed of only "superficial" significance the facts that black candidates have been elected in 7 of 10 elections from 1968 to 1986 and that, during the same period, 7 of 13 black candidates (54%) who received at least 70% black support have won. Pet. App. 15a.

42 U.S.C. § 1973(b); *see Gingles*, 478 U.S. at 46 (even "the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation"). And the third step of vote-dilution analysis, as this Court ruled in *Gingles*, is simply whether white bloc voting has usually defeated the black-preferred candidates. 478 U.S. at 51. That inquiry is in no way targeted at, or limited to, defeats for a proportional seat.

Congress did not write into Section 2 an express denial of a right to proportional representation only to have the courts introduce a requirement that an election system achieve proportional representation most of the time. To the contrary, Congress rejected the entire concept of proportional representation in favor of a standard of equal access (*see* S. Rep. 417, *supra*, at 16, 193-94), a standard that plainly does not require "usual" proportional representation. Indeed, such a requirement would negate the Senate Report's multi-factor approach, with its emphasis on a searching, functional inquiry into the full set of circumstances surrounding a jurisdiction's electoral history. *See* S. Rep. 417, *supra*, at 28-30. Moreover, the Senate Report, in explaining the 1982 version of Section 2, relied on various decisions that had rejected vote-dilution challenges to systems that had never produced proportional representation. *See* S. Rep. 417, *supra*, at 32, 33 (relying on, *e.g.*, *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Black Voters v. McDonough*, 565 F.2d 1 (1st Cir. 1977); *Dove v. Moore*, 539 F.2d 1152 (8th Cir. 1976)).

As this case readily shows, the problem with an emphasis on achieving proportional representation is that it may well miss the forest for the trees. Black voters in Norfolk simply are not being frozen out of the normal political processes by which groups achieve electoral representation despite being a minority of the voting population. Not only are black registration and voting rates higher than those of whites, but there is a consistent and

substantial level of white crossover voting for candidates supported by a majority of black voters. Indeed, "[t]he white cross-over vote has combined with the black vote to elect the black-preferred candidates most of the time." Pet. App. 55a. The candidates endorsed by the major black political organization have consistently been elected. And none of the other Senate Report factors indicating a denial of equal access to electoral processes is present. *See* pp. 6-7, *supra*.[24]

Unlike the Fourth Circuit, this Court in *Gingles* did not require that elections be looked at seat-by-seat to determine whether black voters can elect a certain number of representatives; rather, it defined the proper inquiry as whether white bloc voting over time has "usually" defeated the candidates supported by a politically cohesive black voting bloc. 478 U.S. at 51.[25] Here, not only have most black-preferred candidates been elected, but that has resulted because of white crossover voting. Moreover, since 1974 there have been at least two and at times three (out of seven) members of the City Council who not only ran with the leading black political organization's endorsements but were elected with a majority of black

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[24] Of course, as *Gingles* explained (478 U.S. at 56-57 & n.25), the significance of a particular level of crossover voting varies according to a number of factors, such as the presence of majority vote requirements, designated posts, or prohibitions against single-shot voting (none of which exists in Norfolk), the registration rates of minority voters (in Norfolk, black registration is higher than white registration), the number of candidates running (all Norfolk elections have had crowded fields), and the number of elections in which the minority group has sponsored candidates (black voters have sponsored candidates in all Norfolk elections since 1972). The situation in *Gingles* itself was quite different from the situation here. *See* 478 U.S. at 38-42, 58-61, 81-82.

[25] Thus, the Court in *Gingles* explained that "legally significant racially polarized voting" requires "a white bloc that normally will defeat the combined strength of minority support plus white 'crossover' votes." 478 U.S. at 56.

voters' support.[26] Furthermore, notwithstanding the greater number of white voters in Norfolk, the significant electoral influence of black voters has led to the election of some candidates less preferred by whites over candidates substantially more preferred by whites.[27] This picture is not the sort of white bloc voting or black vote dilution that Section 2 is meant to condemn.

"Multimember districts and at-large election schemes . . . are not *per se* violative of minority voters' rights." *Gingles*, 478 U.S. at 46, 48; *see* S. Rep. 417, *supra*, at 16.[28] Although at-large systems are subject to abuse, it has long been recognized that they may serve important political values unavailable in racially defined ward systems that isolate most black voters in a few districts and leave most districts with no appreciable black constituency. At-large systems, for example, may make it more likely that all officeholders have city-wide perspectives on

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[26] Hence, even if respondents had proved that black-preferred candidates were usually defeated, Norfolk would still prevail under *Gingles*' separate defense based on proportional representation. 478 U.S. at 77.

[27] For example, in 1968, Judge Jordan, with 28.7% of the white vote, defeated a white incumbent (Schweitzer) who had 63.7% white support. In 1978, both Mrs. Howell, with 26.6% of the white vote, and Rev. Green, with 32.2% of the white vote, defeated a white candidate (Middleton) who had 64.1% white support. In 1980, Mrs. Howell, with 31.7% of the white vote, defeated white candidate Phillips, who had 56.3% white support. And in 1986, Rev. Green, with 27.3% of the white vote, defeated candidate Wright, who had 60.3% white support. Several other candidates have lost to candidates with less white support. *See* Pet. App. 208a-217a.

[28] Prior to the 1982 amendments, this Court and other courts had upheld multi-member-district systems in cases (*e.g.*, *Whitcomb v. Chavis*, 403 U.S. 124, 142 (1971); *Fortson v. Dorsey*, 379 U.S. 433 (1965); *Dove v. Moore*, 539 F.2d 1152 (8th Cir. 1976)) that the 1982 Congress expressly relied on as setting the proper standard for claims under the amended Section 2 (*see* S. Rep. 417, *supra*, at 33).

issues; reduce the patronage and other problems of ward-heeling; make *more* of the officeholders actually beholden to and therefore responsive to black voters; make it much more costly for politicians simply to write off minority voters' interests (as can be done in a ward system where minority voters are not among the constituents in the non-black wards); diminish rather than accentuate racial allegiances and divisions; and nourish a sense of common citizenship rather than separatism.[29] Congress thus decided to permit local jurisdictions to choose those electoral values over competing ones, unless minority voters are systematically denied access to electoral representation by being frozen out of the normal processes by which numerical minorities make their voices heard in a democracy. *See* S. Rep. 417, *supra*, at 193-94 (statement of Sen. Dole); *Whitcomb v. Chavis*, 403 U.S. at 153-55. The Fourth Circuit, by focusing on the need to achieve pro-

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[29] *See, e.g., Whitcomb v. Chavis*, 403 U.S. at 142 n.22; *id.* at 157 n.38 (citing studies); *Fortson v. Dorsey*, 379 U.S. at 438; *Dove v. Moore*, 539 F.2d at 1155 n.4; Blacksher & Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden: *Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 Hastings L.J. 1, 45 (1982) (relied on in *Gingles*); Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 Ga. L. Rev. 353, 359 (1976) (relied on in *Gingles*). A number of these points were made by witnesses in the 1982 Senate hearings and underlie the resulting congressional decision to ensure, through express statutory language, against reading Section 2 to require proportional representation. *See Voting Rights Act: Hearings on S. 53, et al. Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 1310, 1330, 1361, 1449 (1982) (testimony of Professors William Van Alstyne, Donald Horowitz, and James Blumstein); A. Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* 124 (1987) (general study of Voting Rights Act).

Judge Jordan, the first black member of Norfolk's City Council, made what is perhaps the central point about the values that may be served by an at-large system in his testimony at the trial in this case: "How does it help the black community to limit itself to two predominantly black wards and be of no consequence in the remainder of the community?" Tr. 1527.

portional representation, has largely read that congressional decision out of the statute.

The approach taken by the court of appeals is all the more troubling because it seems to incorporate the notion that black voters must achieve proportional representation with *black* candidates. In *Gingles*, this Court left unresolved the question of when, if ever, the race of candidates may be taken into account in a vote-dilution case. Four Justices concluded that the race of the candidate is irrelevant to vote-dilution analysis. 478 U.S. at 68. Justice White expressed the view that race would be relevant under some circumstances (*id.* at 83), and four Justices did not express a view on what circumstances, if any, would justify considering the race of the candidate (*id.* at 101) (O'Connor, J., concurring). No Justice suggested, as the Fourth Circuit did in this case, that a finding of vote dilution could be premised on a count of electoral successes that disregarded white candidates supported by a black majority. Among lower federal courts, the Eleventh Circuit has embraced the *Gingles* plurality view that the candidates' race is irrelevant to the analysis (*Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1557-58 (1987), *cert. denied*, 108 S. Ct. 1111 (1988)), while the Tenth Circuit, in affirming the rejection of a vote-dilution claim, has relied on the election of white candidates as the representatives of Hispanic voters' choice (*Sanchez v. Bond*, 875 F.2d 1488 (1989), *cert. pet'n filed*, No. 89-353 (Aug. 28, 1989)).[30] The issue is unquestionably one on which further guidance from this Court is needed.

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[30] *See Citizens for a Better Gretna v. City of Gretna*, 834 F.2d at 502 (treating successful white candidates as representatives of choice even though a black candidate lost).

II. The Court Of Appeals Relied On An Incorrect View Of Who Counts As A "Representative Of Choice" Of Minority Voters In At-Large, Multi-Seat Elections.

The court of appeals not only narrowed the test for finding a violation of Section 2 in impermissible fashion; it also took far too restricted a view of what candidates supported by black voters can be considered "representatives of their choice." The court adopted a presumption—not embraced by any other court—that candidates who receive a majority of black votes are not "representatives of [black voters'] choice" so long as another candidate receives more black votes but loses. Pet. App. 10a-11a, 108a. The court then effectively turned that presumption into a legal definition when it held, as a matter of law, that Mrs. Howell in 1974 and 1980 and Mr. Staylor in 1974 were not representatives of choice of Norfolk's black voters—even though the district court had found to the contrary and they won substantial majorities of the black votes, were endorsed by the leading black political organization, and defeated black candidates among black voters. *Id.* at 11a-13a.[31]

The court's view of who counts as "representatives of choice"—aside from conflating the two separate issues of who are the candidates of choice and how often they have won—makes little sense. In any election like Norfolk's,

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[31] This ruling affects two stages of the *Gingles* framework. First, it alters the analysis of whether black voters' representatives of choice have usually been defeated. It does not, however, alter the result, for, as Judge Chapman pointed out, even without considering Mrs. Howell in 1974 and 1980 and Mr. Staylor in 1974, the candidates supported by a majority of black voters won half the time between 1968 and 1986. Pet. App. 30a. Second, the court's disregard of Mrs. Howell in 1974 and 1980 and Mr. Staylor in 1974 affects the analysis of the *Gingles* proportional-representation defense. Even without considering those Council members, however, black-preferred candidates filled two seats on the Council between 1978 and 1980 and from 1984 to the present. As discussed below (pp. 26-28, *infra*), the court of appeals also eliminated from consideration the minority electoral successes in 1984 and thereafter.

where multiple seats are open and minority voters can and do participate fully in the selection of candidates for all of those seats, minority voters necessarily will have more than one candidate of choice.[32] Nothing in the "equal opportunity" policy of Section 2, moreover, supports a construction that effectively entitles black voters to elect any candidate who receives more votes than another candidate who receives a majority of black support but also has broader (cross-racial) appeal and therefore wins. Rather, any candidate who receives a majority of black support is properly considered a "representative" of black voters' choice, at least if, examining all of the circumstances (including endorsements by black political organizations), the district court does not find for some scund reason that the candidate was not among those affirmatively supported by black voters.

The Fifth Circuit has taken a view of who counts as a representative of choice contrary to that of the Fourth Circuit here, treating *all* of the three black-preferred candidates for three open seats as candidates of choice for purposes of vote-dilution analysis. *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d at 502 ("In a multiple seat election such as Gretna's aldermanic race, the minority necessarily will have more than one preferred candidate."). The United States, in its brief to

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[32] An unsuccessful candidate receiving more black voters' votes, of course, counts as a "representative[ ] of their choice" as well. But in determining whether bloc voting usually defeats candidates supported by black voters, a court should not regard the unsuccessful candidates as the *only* representatives of choice and simply disregard other candidates with substantial black support. Thus, Mrs. Howell and Mr. Staylor were representatives of black voters' choice in 1974 and 1980, as were Lenious Bond in 1974 and Evelyn Butts in 1980. The defeats of the latter two were clearly counted by the district court in its assessment of whether black-preferred candidates have "usually" been defeated (by white bloc voting). *See* Pet. App. 56a, 67a, 68a. The court of appeals was simply wrong in stating that the district court treated Howell and Staylor as the representatives of black voters' choice "rather than" Bond and Butts. Pet. App. 10a.

this Court on the petition for a writ of certiorari in that case, expressly agreed with that position. Brief for the United States As Amicus Curiae in No. 88-597, at 11. *See also Williams v. State Bd. of Elections*, 718 F. Supp. 1324, 1328 n.8 (N.D. Ill. 1989) (counting all candidates supported by a majority of black voters). The third-ranked black-supported candidate in a three-seat election counts as a representative of black voters' choice when that candidate wins (as here) just as when that candidate loses (as in *Gretna*), and there is no reason why the conclusion should change depending on how the first two ranked candidates fare. Indeed, the Fourth Circuit's view leads to the nonsensical conclusion that Mrs. Howell was not a candidate of black voters' choice in 1980, when she received 73% of the black vote, but was a candidate of choice in 1978, when she received only 68% of the black vote. *See* Pet. App. 24a-25a, 210a-211a.

The court of appeals compounded its error with respect to Mrs. Howell and Mr. Staylor by discounting the significance of their endorsement by Concerned Citizens. *See* Pet. App. 11a. Endorsement by a leading black political organization obviously supports a finding that a candidate who receives a majority of black voters' votes is a "representative of their choice." Indeed, sponsorship was relied on by the Tenth Circuit in *Sanchez v. Bond*, 875 F.2d at 1496. *See Gingles*, 478 U.S. at 57 n.25 (noting importance of black sponsorship of candidates).[33] And the court of appeals' reliance on the substantive views of

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[33] From 1972 through the district court's decision in 1988, no candidate received a majority of the black vote without Concerned Citizens' endorsement. Pet. App. 208a-217a; Pretrial Stip. ¶ 55; 1986 Stip. ¶ 3. Four of respondents and their counsel, Mr. Gay, ran for public office in Norfolk; none received Concerned Citizens' endorsement; and none received more than about one-third black voter support. Pet. App. 72a-73a.

See Sanchez, 875 F.2d at 1496 (affirming finding that white candidates sponsored by Hispanic-controlled Democratic Party were candidates of Hispanics' choice); Blacksher and Menefee, *supra*, at 59-60.

Mrs. Howell and Mr. Staylor in 1984 (*see* Pet. App. 12a-13a)—as a basis for discrediting them as representatives of black voters' choice—introduces a wholly unjustified element into the statutory definition. As Judge Chapman concluded, "a litmus test" for ideologically correct beliefs has no place in Section 2 analysis. *Cf. Gingles*, 478 U.S. at 63 (plurality opinion) ("the reasons black and white voters vote differently have no relevance to the central inquiry of § 2").

III. The Court Of Appeals Erroneously Discounted Several Black Electoral Successes As Insignificant Because Of "Special Circumstances."

Although the points previously discussed provided the core of its decision, the court of appeals went on to discount several other electoral successes as the products of "special circumstances."[34] Here, again, the court went too far.

First, the court concluded that the 1984 election of Rev. Foster should not be counted, primarily because his election occurred after the lawsuit was filed and the court believed that he received unusual levels of white support. Pet. App. 17a-20a. But that conclusion rests chiefly on the incorrect view that, in judging whether Rev. Foster received unusual white support, the only proper basis of comparison was the white support given *black* candidates vying for a *second* Council seat in other elections. *See* Pet. App. 19a. That view, of course, is based on the same

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[34] The court of appeals had to eliminate these additional elections from the calculus in an attempt to shore up its ruling reversing the district court. First, unless the elections since 1984 were discounted, respondents could not show "usual" defeat of black-preferred candidates, even without considering Mrs. Howell in 1974 and 1980 and Mr. Staylor in 1974. Second, the *Gingles* proportional-representation defense should still apply, even without considering the excluded 1974 and 1980 Howell and Staylor victories, because two black-preferred Council members sat between 1978 and 1980 and from 1984 to the present. *See* note 31, *supra*.

notion of proportional representation that guided the more general measurement of black electoral successes. And, although the court stated in passing that it believed there was a scheme of white leaders to moot this case, the district court had found to the contrary, the court of appeals had previously upheld that finding, and there was no new basis for reaching a different conclusion. *See* p. 10, *supra*. To declare that finding clearly erroneous, for no better reasons than those relied on by the court of appeals, wrongly displaces the district court from its proper fact-finding role. *See Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985).

Second, the court concluded that incumbency was a "special circumstance" that required discounting the successes of black incumbents. Pet. App. 20a-21a; *see Gingles*, 478 U.S. at 57, 60. But the district court in this case had considered the possible effects of incumbency and had found nothing aberrational about the reelection of black incumbents. In stark contrast to the situation in *Gingles*, where the district court concluded that the reelection of a few incumbents could not change the overall conclusion that black-supported candidates usually lost (478 U.S. at 60), here the district court found that black-supported candidates (both incumbents and non-incumbents) have usually won—indeed, have won in eight straight elections through 1988. In any event, "it is difficult to see why the fact of incumbency . . . denigrates continued success." *Overton v. City of Austin*, No. A-84-CA-189 (W.D. Tex. Sept. 15, 1987), *aff'd*, 871 F.2d 529 (5th Cir. 1989); *see also Sanchez v. Bond*, 875 F.2d at 1494 (deferring to district court finding that unopposed candidates should be counted in vote-dilution analysis). Indeed, the 100% black reelection rate, together with the fact that the white reelection rate is slightly lower chiefly because of black-supported candidates' defeat of white incumbents (*see* Pet. App. 208a-217a), would seem to show in this respect at least that black voters have a greater, not lesser, ability to elect representatives

of their choice. Finally, as Judge Chapman pointed out, if incumbency leads to discounting electoral successes, there would be few electoral successes to count in any American election. Pet. App. 36a.

IV. The Court Of Appeals Failed To Address The District Court's "Totality Of The Circumstances" Determination And To Give The District Court's Findings Proper Deference.

The court of appeals also erred in reversing the district court's ultimate finding that there was no unlawful vote dilution simply on the basis of its conclusion that respondents had "satisfied the tripartite test set forth in *Gingles*." Pet. App. 21a. *Gingles* ruled that the three requirements of geographic compactness, minority bloc voting, and usual defeat by white bloc voting were "necessary," not sufficient, conditions (478 U.S. at 50-51) for a violation. *See Sanchez v. Bond*, 875 F.2d at 1492. The Court in *Gingles* rejected any rigid approach like that taken by the court of appeals in this case, making clear that the Section 2 inquiry involves a multi-factor approach, with the district court undertaking a "searching practical evaluation of the past and present reality" of the jurisdiction's electoral politics, taking a "functional view of the political process" and applying "a flexible, fact-intensive test," with the ultimate finding regarding vote dilution committed to the judgment of the district court unless it is clearly erroneous. 478 U.S. at 45-46, 79-80 (internal quotation marks omitted, relying on S. Rep. 417, *supra*, at 30, and Fed. R. Civ. P. 52(a)). *See also id.* at 79 ("the application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law").

The district court in the present case followed the *Gingles* approach and found that there was no vote dilution. Yet the court of appeals simply failed to address the district court's overall "totality of the circumstances"

finding. That failure, together with the court of appeals' repeated refusals to give adequate deference to the district court's findings (detailed above), improperly displaced the role of the district court as established in *Gingles*.

CONCLUSION

This is the first post-*Gingles* case to come to this Court that involves a court of appeals' finding of a Section 2 violation in the face of a contrary district court finding and of 20 years of minority electoral successes. If that ruling is correct, then all at-large election systems are imperilled. That result is contrary to Section 2 and should be prevented.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

H. BARTOW FARR, III
RICHARD G. TARANTO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

R. HARVEY CHAPPELL, JR.*
PAUL W. JACOBS, II
CHRISTIAN, BARTON, EPPS, BRENT & CHAPPELL
1200 Mutual Building
909 East Main Street
Richmond, Virginia 23219
(804) 644-7851

PHILIP R. TRAPANI
HAROLD P. JUREN
OFFICE OF THE CITY ATTORNEY
908 City Hall Building
Norfolk, Virginia 23501
(804) 441-2871

* Counsel of Record